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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No.

JOSEPH BOMBACINO,
Petitioner.

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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JOSEPH BOMBACINO,

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PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petitioner prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Illinois entered in this cause on January 14, 1972.

OPINION BELOW.

The opinion of the Supreme Court of Illinois is reported in 280 N. E. 2d 697 and is reprinted herein as Appendix A, *infra.*

JURISDICTION.

The judgment of the Supreme Court of Illinois (Appendix A, *infra*) was entered on January 14, 1972. A timely petition for rehearing was denied on March 28, 1972 (Appendix B, *infra*). Petitioner's motion to stay the mandate of the Illinois Supreme Court pending final disposition of

this petition was granted by that court sitting in vacation (Appendix C, *infra*). This petition is filed within 90 days of the final order of the Illinois Supreme Court denying the petition for rehearing. The jurisdiction of this court is invoked under 28 U. S. C. 1257(3).

QUESTION PRESENTED.

Does the decision of this Court in *Kent* v. *United States*, 383 U. S. 541, 16 L. Ed. 2d 84, 86 S. Ct. 1045, and the due process clause of the Fourteenth Amendment to the United States Constitution require that a State juvenile court provide a hearing, with attendant reasons stated, before that court dismisses a delinquency petition against a 16 year old boy, waives its jurisdiction over that boy, and thereby permits the State to prosecute him as an adult?

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourteenth Amendment to the U. S. Constitution provides in pertinent part:

> ". . . Nor shall any State deprive any person of his life, liberty, or property, without due process of law; . . ."

STATUTES INVOLVED.

CHAPTER 37, SEC. 702-7(1) reads in pertinent part:

> "Except as provided in this section, no boy who is under 17 years of age . . . at the time of the alleged offense may be prosecuted under the criminal laws of this state or for violation of any ordinance of any political subdivision thereof."

CHAPTER 37, SEC. 702-7(3) reads as follows:

> "If a petition alleges commission by a minor 13 years of age or older of an act which constitutes a crime under laws of the state, the State's Attorney shall

determine the court in which the minor is to be prosecuted; however, if the Juvenile Court Judge objects to the removal of the case from the jurisdiction of the Juvenile Court, the matter shall be referred to the Chief Judge of the Circuit for decision and disposition."

STATEMENT.

On April 25, 1969 your petitioner was arrested for the offense of aggravated battery in that he was alleged to have participated in the beating of one William Edyburn. A delinquency petition was filed against him, as he was 16 years old on that date. Subsequently, William Edyburn died and on May 6, 1969 the State's Attorney of Cook County, Chicago, Illinois filed a new delinquency petition charging your petitioner with participating in the death of Edyburn. The State, pursuant to Ch. 37 Sec. 702-7(3), filed a motion to remove the cause from the juvenile court to the adult court for prosecution. On May 13, 1969 without a hearing and without any reasons given for its ruling, the juvenile court stated:

> "Based on that section (referring to Ch. 37, Sec. 702-7(3)), I believe the State has a right to proceed in the manner that they indicated and requesting this court to waive its jurisdiction over the juvenile. The order will be in each of the four petitions (There was another juvenile involved who was subsequently acquitted): Criminal proceedings instituted, juvenile petitions will be dismissed and these cases will be closed as to the juvenile court. That is the order."

Prior to the court's ruling the petitioner had objected to the petition of removal. Petitioner was subsequently indicted for the offense of murder in the Circuit Court of Cook County. A motion to dismiss the indictment for failure of the juvenile court to conduct a hearing and to state reasons for the transfer was denied. The petitioner was

tried by a jury which returned a verdict of guilty of voluntary manslaughter and the petitioner was sentenced to the Illinois Department of Corrections for a term of not less than one nor more than five years.

REASONS FOR GRANTING THE WRIT.

Failure of the juvenile court to conduct a hearing and to state reasons for its waiving its jurisdiction denied the petitioner due process of law.

This Court in *Kent* v. *United States*, 383 U. S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 held, in interpreting a juvenile court statute for the District of Columbia that fairness and due process were required prior to the juvenile court waiving its jurisdiction over a minor charged with a criminal offense. Certain rights were set forth in the opinion:

> "The juvenile was entitled to a hearing, including access by his counsel to the social records and probation reports . . . and to a statement of reasons for the juvenile court's decision."

For a period of time there was a question as to whether the opinion in *Kent* was merely an interpretation of a statute or had constitutional dimensions. The question was resolved by this Court in the case of *In re Gault*, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 where the Court held:

> "Although our decision (in *Kent*) turned upon the language of the statute, we emphasize the necessity that 'the basic requirements of due process of fairness' be satisfied in such proceedings."

The Illinois Supreme Court in affirming the conviction of Joseph Bombacino and overruling his contention that he was entitled to a hearing prior to the juvenile court's waiving of its jurisdiction over him held:

> "Under our act a due process hearing as prescribed in *Kent* is not required at this stage of the proceeding." 280 N. E. 2d at 699.

The Illinois statute in question provides that on motion of the State a juvenile's criminal case may be transferred to the Circuit Court for prosecution as an adult unless the juvenile court Judge objects and if he does so object, the matter is then referred to the Chief Justice of the County in which the case is pending for final disposition. The transfer of the juvenile's case and the attendant non-objection of the juvenile court Judge is not an appealable order. *People* v. *Jiles*, 43 Ill. 2d 145. The question now presented is whether *Kent* and the U. S. Constitution requires a hearing be held and reasons given before a juvenile defendant's delinquency petitions are dismissed and the Juvenile court waives its jurisdiction and protection over a juvenile and allows the State to try him as an adult. The Illinois Supreme Court in the instant case answered that question in the negative.

However, many States which has been confronted with this same question and Circuit Courts of Appeals in the United States have decided that question in the affirmative:

U. S. Courts of Appeal.

Third Circuit, *U. S. ex rel. Turner* v. *Rundle*, 438 F. 2d 639 (3rd Cir. 1971).

Fourth Circuit, *Kemplen* v. *State of Maryland*, 428 F. 2d 169 (4th Cir., 1970).

Ninth Circuit, *Powell* v. *Hocker*, 453 F. 2d 653 (9th Cir., 1972).

District Courts.

Brown v. *New Jersey*, 35 U. S. L. W. 2553 (D. N. J. 1967).

STATE COURTS.

Florida. *Steinhauer* v. *State*, 206 So. 2d 25 (1968).

Hawaii. *In re Doe*, 50 Hawaii 620, 446 P. 2d 564 (1968). This case holds that an earlier opinion which held that a hearing is not required, is now suspect because of the ruling in *Kent* v. *United States*.

Indiana. *Summers* v. *State*, 248 Ind. 551, 230 N. E. 2d 320.

Kansas. *Templeton* v. *State*, 202 Kansas 89, 447 P. 2d 158 (1968).

Kentucky. *Smith* v. *Commonwealth*, 412 S. W. 2d 256 (1967).

Maryland. *In re Cager*, 251 Md. 473, 248 A. 2d 384 (1968).

Missouri. *State ex rel. Arbeiter* v. *Reagan*, 427 S. W. 2d 371 (1968).
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Nevada. *Kline* v. *State*, 464 Pa. 2d 460 (1970).

New Jersey. *In re State in Interest of H. C.*, 106 N. J. Super. 583, 256 A. 2d 322 (1969).

Ohio. *State* v. *Yoss*, 10 Ohio App. 2d 47, 225 N. E. 2d 275 (1967).

Pennsylvania. *Commonwealth ex rel. Freeman* v. *Superintendents*, 212 Pa. Super. 422, 242 A. 2d 903 (1968).

Rhode Island. *In re Korreia*, 243 A. 2d 759 (1968)

Washington. *State* v. *Piche*, 74 Wash. 2d 9, 442 P. 2d 632.

Wisconsin. *In re Winburn*, 32 Wisc. 2d 152, 145 N. W. 178 (1966).

Ironically, the Illinois Supreme Court prior to the decision in the instant case recognized that the due process clause of the U. S. Constitution applied to Juvenile Court

proceedings for in the case of *In re Urbasek*, 38 Ill. 2d 535, the court held that the quantum of proof at a juvenile adjudicatory hearing was proof beyond a reasonable doubt. In fact, that decision was rendered prior to this Court's decision in the case of *In re Winship*, 397 U. S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

On March 6, 1972, almost two months after the Illinois Supreme Court decision in the instant case, an Illinois Appellate Court held that *Kent* required a just and fair hearing before a Juvenile Court waived its jurisdiction over a defendant. *People* v. *Sprinkle*, 280 N. E. 2d 29 (3rd App. District of Illinois, 1972).

This Court has recognized that procedural due process is essential whenever a right or privilege conferred by the government is withheld from a citizen. In *Goldberg* v. *Kelly*, 397 U. S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) this court stated that:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 168, 95 L. Ed. 817, 852, 71 S. Ct. Reporter 624 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the Governmental interest in summary adjudication." 25 L. Ed. 2d at 296, 397 U. S. at 263.

It cannot be disputed that the juvenile does suffer a grievous loss and that he is faced with grave consequences when he is transferred from the Juvenile Court to the adult criminal court. These consequences include:

(a) The probability of severe punishment.

(b) The lack of confidentiality of the proceedings.

(c) A public arrest record.

(d) Possible loss of civil rights upon conviction.

(e) Disqualification for future public employment.

(f) The quite likely abuse of a youthful offender in a penitentiary of older and more hardened convicted felons.

(g) The likelihood of harsher penalty upon repetition under various recidivist statutes through the United States.

Whether the petitioner herein can avail himself of a juvenile proceeding as a matter of right, or whether the State of Illinois could abolish its entire juvenile court system by a single act of the legislature, is not germane to a decision as to whether due process requires a hearing under the Illinois Juvenile Court Act as it now exists. It has been established that even where a privilege is withheld from an individual, or is revoked after being conferred, due process requires that a hearing be granted prior to a denial or revocation. *Goldberg* v. *Kelly, supra.*

In *Wisconsin* v. *Constantineau*, 400 U. S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971), after noting that it is procedure that marks much of the difference between rule by law and rule by fiat, this Court stated that:

> "Where a person's good name, reputation, honor, or integrity is at stake because of what the Government is doing to him, notice and opportunity to be heard are essential . . . only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." 400 U. S. at 437, 27 L. Ed. 2d at 519.

This Court in *Stanley* v. *Illinois*, ... U. S. ....., 31 L. Ed. 2d 551 (1972), held that due process requires a hearing before an unwed father loses custody of his child. Earlier this Court in *Bell* v. *Burson*, 402 U. S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971) held that due process requires a hearing before a driver's license could be re-

voked where there was no showing of fault on the part of the part of the licensee.

In the instant case the court held no hearing to even establish probable cause that the petitioner was guilty of the offenses charged. Nor did the court inquire into the juvenile's past criminal background, if any (he had none), into his family life, his scholastic record, his IQ, the chances of the juvenile court being able to set up a rehabilitation program if the petitioner was proved guilty of the offense. All these things are necessary for the court to make an intelligent and meaningful ruling as to whether to waive its jurisdiction over a juvenile.

This court has established fundamental fairness as the standard of due process in juvenile proceedings. *In re Gault, supra, In re Winship, supra, McKeiver* v. *Pennsylvania*, 403 U. S. 528, 29 L. Ed. 2d 647, 91 S. Ct. 1976 (1971).

This court in *McKeiver* recognized the value of the juvenile court system and the loss which the juvenile suffers when deprived of the juvenile court's ability to function. In refusing to find a constitutional mandate that a jury trial was required in a juvenile proceedings, this Court held:

> "Meager as has been the hoped for advance in the juvenile field, the alternative would be regressive, would lose what has been gained, and would tend once again to place the juvenile squarely in the routine of the criminal process." 403 U. S. at 547, 29 L. Ed. 2d 662.

The due process standard of fundamental fairness has always included opportunity to be heard at a meaningful time and in a meaningful manner. *Grannis* v. *Ordean*, 234 U. S. 385, 58 L. Ed. 1363, 34 S. Ct. 779 (1914), *Armstrong* v. *Manzo*, 380 U. S. 545, 14 L. Ed. 2d 62, 85 S. Ct. 1187

(1965); *Sniadach* v. *Family Finance Corporation*, 395 U. S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969); *Wisconsin* v. *Constantineau, supra.*

In *Haziel* v. *U. S.*, 404 F. 2d 1275 (1968), the United States Court of Appeals for the District of Columbia recognized the waiver proceedings critical importance to the juvenile in terms of due process when it said:

> "The divide between the juvenile court with its promise of non-punitive rehabilitation and the harsher world of the district court is one not lightly to be crossed." 404 F. 2d at 1278.

The rationale of *McKeiver* was that the right to a jury in a juvenile proceedings would not serve to preserve the juvenile system and would in fact equate it with a criminal proceeding. *McKeiver* supports our contention that due process in juvenile proceedings requires a hearing before the decision to waive jurisdiction of the juvenile courts is made. Conducting such a hearing would strengthen the possibility of retaining the juvenile court's jurisdiction and therefore pursue the "idealistic prospect of an intimate, informal, protective proceeding". *McKeiver, supra.* Consequently it would act as a buttress against the inclination to "tend once again to place the juvenile squarely in the routine of the criminal process". 403 U. S. at 547, 29 L. Ed. 2d at 662.

This Court should recognize its ruling in *Shaughnessy* v. *U. S. ex rel. Mezei*, 345 U. S. 206, 73 S. Ct 625, 97 L. Ed. 956 where the court stated that:

> "No society is free when the Government makes one person's liberty depend upon the arbitrary will of another."

Without a meaningful hearing, without the representation of counsel at such a hearing, without equitably devel-

oped and judicially scrutinized standards for waiver, without stated reasons for the juvenile court's decision regarding the waiver which may be reviewed by the Appellate Courts, there can be no meaningful claim that the juvenile court system is designed to benefit the offender and society. And without this claim the day of ultimate disillusionment where there is little need for the distinction between the criminal process and the juvenile court systems has indeed arisen. So as to preserve this system and so as to maintain those distinctions, this Court is urged to give clear meaning to the following words:

> "There is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Kent* v. *U. S.*, 383 U. S. 554, 16 L. Ed 2d 93.

CONCLUSION.

For the above and foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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PATRICK A. TUITE,
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Of Counsel.

APPENDIX A.

OPINION OF THE SUPREME COURT OF ILLINOIS.

Docket No. 43610—Agenda 24—September, 1971.

THE PEOPLE OF THE STATE OF ILLINOIS, *Appellee*,

vs.

JOSEPH BOMBACINO, *Appellant*.

MR. JUSTICE RYAN delivered the opinion of the court:

Following a jury trial the defendant was convicted in the circuit court of Cook County of voluntary manslaughter and was sentenced to the Department of Correction for a term of from one to five years.

The defendant was 16 years old at the time the offense of which he was convicted was committed. Delinquency petitions concerning this offense were filed charging him with being a delinquent child. Subsequently criminal charges concerning the same offense were filed against the defendant, and the State's Attorney petitioned to remove the case from the juvenile division of the circuit court. The defendant objected and the petition was set for hearing, at which time arguments of counsel were heard but no evidence was offered. Following argument of counsel the court granted the petition, relying on section 2-7(3) of the Juvenile Court Act. (Ill. Rev. Stat. 1967, ch. 37, par. 702-7(3).) The defendant was later indicted along with John Cotton and Ross Rottmann for the murder of William Edyburn, whose death was the basis for the above delin-

quency petitions and criminal charges. Rottmann was severed from the other two defendants and was tried separately and found not guilty. Subsequently the defendant and Cotton were tried together. Cotton was found not guilty and the jury found the defendant, Bombacino, guilty of voluntary manslaughter. This is an appeal from that conviction.

The defendant contends that the criminal division of the circuit court had no jurisdiction over him because section 2-7(3) of the Juvenile Court Act is unconstitutional. This section of the statute provides in part: "If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a crime under the laws of this State, the State's Attorney shall determine the court in which that minor is to be prosecuted; however, if the Juvenile Court Judge objects to the removal of a case from the jurisdiction of the Juvenile Court, the matter shall be referred to the chief judge of the circuit for decision and disposition."

The gist of the contention is that this section grants appellate powers to the chief judge of the circuit to review the decision of another judge of the same court. However, in the present case the judge presiding in the juvenile division did not object to the removal of the action and the matter was therefore not referred to the chief judge of the circuit court for decision and disposition as provided for in the statute. The defendant therefore lacks standing to challenge the constitutionality of this provision of the statute because the same is not involved in this case and the defendant was not in any way aggrieved by this provision which he now claims to be unconstitutional. One who would attack a statute as unconstitutional must bring himself within the class as to whom the law is unconstitutional. *City of Chicago* v. *Lawrence*, 42 Ill. 2d 461, cert.

denied 396 U. S. 39, 24 L. Ed. 2d 208, 90 S. Ct. 263; *People* v. *Hanke,* 389 Ill. 602; *Edelen* v. *Hogsett,* 44 Ill. 2d 215.

Defendant further contends that the criminal division lacked jurisdiction because the judge in the juvenile division did not conduct a hearing on the petition to remove the case from the juvenile division. Defendant relies on *Kent* v. *United States,* 383 U. S. 541, 16 L. Ed. 2d 84, 86 S. Ct. 1045, wherein the Supreme Court in construing the District of Columbia Juvenile Court Act (DC Code (1961), sec. 11-914) held that the statute required a hearing before the juvenile court could waive jurisdiction and permit a minor to be prosecuted for a crime. The statute involved in *Kent,* however, vested the discretion to waive jurisdiction over the minor in the juvenile court. The Illinois statute does not give the same discretion to the court. Rather the State's Attorney in Illinois is vested with the discretion to determine whether or not to proceed criminally against a juvenile offender subject only to the right of the judge presiding in the juvenile division to object, in which event the matter is referred to the chief judge of the circuit court for his decision. (Ill. Rev. Stat. 1967, ch. 37, par. 702-7(3).) Thus under the procedure established by the Illinois Juvenile Court Act the role of the judge is greatly diminished. (*People* v. *Jiles,* 43 Ill. 2d 145.) Under our act a due process hearing as prescribed in *Kent* is not required at this stage of the proceeding.

On April 5, 1969, John Cotton, Ross Rottmann and Peter Krochmolny rode with the defendant, Joseph Bombacino, to the home of Scott Hagler at 900 N. Columbian in Oak Park. The defendant parked the car in the Hagler driveway and the four boys went into the basement of the Hagler home where they remained for about an hour shooting pool and drinking malt liquor. The defendant

then left the Hagler home in search of John Cotton and Peter Krochmolny who had left earlier. From in front of the Hagler home he saw a man walking on the sidewalk across the street. Thinking it was one of his companions he called to him. The man, William Edyburn, responded in a profane manner and came across the street to where the defendant was standing. Words were exchanged and soon blows were struck and Edyburn began beating the defendant. The defendant called for help from his friends and the stranger again crossed the street and ripped an antenna from an automobile which he used as a weapon to defend himself when he was attacked by the four boys. Rottmann went to the defendant's car and removed a baseball bat. Edyburn then ran down the street but was tackled by Cotton. The defendant took the baseball bat from Rottmann and struck Edyburn with it repeatedly about the head.

Soon thereafter police officers arrived on the scene. While talking to the defendant they heard moans coming from the bushes where they found Edyburn. He was taken to the hospital and subsequently died from his injuries. On learning that John Cotton had been with defendant one of the officers went to the Hagler residence and asked for John Cotton. While talking to Cotton at the Hagler residence the officer was informed that the automobile in the driveway belonged to the defendant. The windows of the automobile were open. The officer flashed his flashlight into the automobile and saw a baseball bat in the back seat with the small part of the bat on the floor and the fat part of the bat upright. There was a spot on the fat part of the bat which appeared to be blood. The officer was from two to four feet away from the bat when he saw it. He then opened the door, reached inside and took the baseball bat from the automobile. Following a hearing the court denied the defendant's motion to suppress the baseball bat as evidence.

The defendant contends that taking of the bat constituted an unlawful search and seizure.

A man had been severely beaten and the officer went upon the Hagler property for the purpose of ascertaining the whereabouts of John Cotton whom he had been informed had been with the defendant. He was not on the Hagler premises for the purpose of conducting a search. While thus lawfully upon the premises in the performance of his duty to investigate the incident, he saw the baseball bat which was plainly visible from the exterior of the automobile. A search implies a prying into hidden places for that which is not open to view. Here there was no search. The officer having thus seen the baseball bat with what appeared to be blood thereon was authorized to take the same. Such a taking did not constitute an unreasonable seizure. *People* v. *McCracken*, 30 Ill. 2d 425; *People* v. *Tate*, 38 Ill. 2d 184; *People* v. *Davis*, 33 Ill. 2d 134; *People* v. *Elmore*, 28 Ill. 2d 263.

The defendant attaches importance to the fact that the officer could only see the bat by the use of his flashlight and cites *People* v. *Lind*, 370 Ill. 131, to support his position. In *Lind* there was without question an illegal search. The officers went to the defendant's residence without a search warrant for the purpose of searching the premises. While on the premises they went to the defendant's henhouse looking for stolen chickens. They had to open the doors of the henhouse before they could look into the building. Their conduct constituted an illegal search and the fact that they used a flashlight to explore the interior of the henhouse had no bearing on the illegality of the search. The use of artificial light to observe that which is in plain view has not been considered a fact which would alter the plain-view doctrine. *United States* v. *Lee*, 274 U. S. 559, 71 L. Ed. 1202, 47 S. Ct. 746; *People* v. *Pickett*, 39 Ill. 2d 88; *People* v. *Wright*, 41 Ill. 2d 170.

The defendant's case was removed from the juvenile court to the criminal court on May 13, 1969. He was jointly indicted with John Cotton and Ross Rottmann for the murder of William Edyburn and was released on bond. On September 29, 1969, the defendant demanded trial. He was ultimately tried on February 24, 1970, 147 days after his demand for trial was made. Section 105-5(a) of the Code of Criminal Procedure (Ill. Rev. Stat. 1969, ch. 38, par. 103-5(a)) provides that a person in custody shall be tried within 120 days from the date he was taken into custody unless delay is occasioned by defendant. In 1969 the legislature amended paragraph (b) of section 103-5 which now provides that a person on bail shall be tried within 160 days from the date the defendant demands trial unless delay is occasioned by defendant. Prior to the 1969 amendment the time specified in this paragraph was 120 days, the same as applied to persons in custody. The defendant contends that the amendment to section 103-5(b) is unconstitutional because it discriminates against those who are placed on bond. We do not find it necessary to reach the constitutional question because the defendant had filed a motion for a severance from the other two defendants and on January 21, less than 120 days after the defendant first demanded trial the court allowed the defendant's motion for a severance from Rottmann but refused to sever the defendant from Cotton for purposes of trial. This court has held that the granting of defendant's request for a severance tolls the running of the statutory period. (*People* v. *Lee*, 44 Ill. 2d 161.) Accordingly a new statutory period began to run on January 21, 1970, and the additional 40 days added to the provisions of section 103-5(b) by the amendment in 1969 did not affect the defendant. Under the authority cited above in this opinion he lacks standing to challenge the constitutionality of the amendment to this section. *City of Chicago* v. *Lawrence*,

42 Ill. 2d 461; *People* v. *Hanke*, 389 Ill. 602, and *Edelen* v. *Hogsett*, 44 Ill. 2d 215.

At the close of the trial the People submitted and the court gave an instruction on voluntary manslaughter. The defendant contends that he was thereby denied his constitutional rights to notice and to be indicted for the offense of which he was convicted. This same contention was raised and rejected by this court in *People* v. *Lewis*, 375 Ill. 330. We believe the holding in *Lewis* is dispositive of this contention. See also *People* v. *Korycki*, 45 Ill. 2d 87; *People* v. *Wiggins*, 12 Ill. 2d 418, 426; *People* v. *Crawford*, 387 Ill. 616, 620; *People* v. *Simmons*, 26 Ill. 2d 400, 402.

The defendant contends that he was prejudiced by the State's Attorney's reference during the opening statement to the prior acquittal of Rottmann. Assuming, *arguendo*, that the comment was improper the court immediately thereafter instructed the jury to disregard any reference to any previous trial and to consider only the evidence in this case. We do not see that the defendant was prejudiced by this one remark.

Defendant also objects to remarks made by the State's Attorney during the closing argument. However, it appears that no objections thereto were made at the trial and the defendant may not now complain thereof. *People* v. *Hampton*, 44 Ill. 2d 41; *People* v. *Donald*, 29 Ill. 2d 283.

Defendant's final contention is that he could not have been found guilty of voluntary manslaughter because there was no sudden and intense passion and in the alternative there was a sufficient cooling off period. He argues that under these circumstances he may have been convicted of murder, but not manslaughter. There was evidence of a severe altercation during which the decedent had punched, kicked and struck defendant with a car antenna following

which the defendant beat the decedent with a baseball bat. From the evidence the jury could properly conclude that the defendant was guilty of manslaughter and not murder. Under these facts we will not disturb the verdict of the jury. *People* v. *Harris,* 8 Ill. 2d 431.

For the above reasons the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

APPENDIX B.

(March 28, 1972)

BE IT REMEMBERED, that, to-wit: on the 28th day of March, A. D. 1972, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, *Appellee,* vs. JOSEPH BOMBACINO, *Appellant.* No. 43610	Appeal from Circuit Court Cook County (Criminal Division 69-2340.

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

APPENDIX C.

(April 11, 1972)

No. 43610

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,
vs.
JOSEPH BOMBACINO,

ORDER.

On motion of the Appellant notice having been given the Appellee, and the court being fully advised of the facts, it is hereby ordered that the issuance of the mandate be stayed until further notice of this court.

.....
Judge.

Date: .....

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SEP 19 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1705

JOSEPH BOMBACINO,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.)

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Supreme Court of Illinois is reported at 51 Ill. 2d 17; 280 N. E. 2d 205.

JURISDICTION.

Jurisdiction in this Court has been adequately alleged.

QUESTIONS PRESENTED.

Whether it is constitutionally permissible to confer upon a prosecutor the discretion to decide to try a juvenile in a regular criminal court where the juvenile's conduct constitutes a criminal offense.

Whether it is constitutionally permissible to enact a procedure whereby a hearing on the issue of trial in criminal court is held by the chief judge of the circuit only if a juvenile court judge objects to the prosecutor's decision.

STATEMENT OF THE CASE.

The petitioner was tried and convicted of voluntary manslaughter.

The petitioner was sixteen years of age at the time of the offense. Pursuant to the statute challenged here, the prosecutor filed petitions to remove the case from juvenile court. The juvenile court judge heard arguments of counsel but entered no objection to the prosecutor's petitions. Thereafter, juvenile court actions were dismissed and the case was tried in the Criminal Court.

REASONS FOR DENYING THE WRIT.

The petitioner strives to present this case as one involving the problems resolved in *Kent* v. *United States*, 383 U. S. 541 (1966). In fact, the issues presented are not similar.

In *Kent*, the Court was faced with a statute that gave plenary power to the juvenile court to determine whether it should waive jurisdiction over the juvenile before it. And the statute required that a "full investigation" be conducted prior to the exercise of that power. The Illinois statute (Ill. Rev. Stat., Ch. 37, Sec. 702-7(3)) "does not vest jurisdiction in the court to determine the matter of waiver of jurisdiction." *People* v. *Handley*, 51 Ill. 2d 229, 233, 282 N. E. 2d 205 (1972). The Illinois statute does not require the full investigation that the *Kent* statute did. Essentially, the decision whether to proceed in the criminal courts is left to the discretion of the prosecutor. Further,

even if there is an objection by the juvenile court judge, it is not the juvenile court that decides the issue of jurisdiction. That decision is left to the chief judge of the Circuit Court. It is the obvious purpose of the Illinois statute to give the prosecutor the right to decide whether to proceed against a juvenile in the criminal court subject only to an affirmative act by the juvenile court to require a full hearing before the chief judge of the circuit.* Presumably such objections would rarely be made and the primary burden of decision is intended to be the prosecutor's.

Accordingly, the petitioner is objecting to a statute, not like the *Kent* statute, but one more like the present District of Columbia statute recently upheld in *United States* v. *Alexander*, 333 F. Supp. 1213 (D. D. C. 1971). In *Alexander* the Court upheld a statute which gave the United States Attorney the absolute power to transfer cases from juvenile court by the simple expedient of filing certain enumerated charges against juveniles. If the prosecutor was content with juvenile proceedings he could simply exercise his discretion not to charge. It would seem incredible to us that a similar Illinois statutory scheme would fall simply because a juvenile court judge is empowered to take an affirmative action to secure a hearing on the issue of removal. To so hold would be to encourage legislatures to withhold from juvenile courts any role in the process as Congress has done in the District of Columbia.

The sole remaining claim of petitioners is directed against the exercise of prosecutorial discretion without articulated standards. The argument has been made often in both state and federal courts (with respect to misdemeanor/felony and capital/non-capital charges) and always rejected.

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* Since the juvenile court judge did not object in this case, no question can be raised as to the nature and sufficiency of a hearing before the chief judge.

The Illinois rule is stated in *People* v. *Rhodes*, 38 Ill. 2d 389, 231 N. E. 2d 400 (1967) where the defendant could have been prosecuted under the misdemeanor or intimidation or the felony of attempt theft. The Court rejected defendant's argument that he had the right to be charged with an applicable misdemeanor rather than an applicable felony and that it was unlawful to allow the prosecutor to choose. The Court stated:

> "The State's Attorney is the representative of the People and has the responsibility of evaluating the evidence and other pertinent factors and determining what offense can properly and should properly be charged." See 38 Ill. 2d at 396. 231 N. E. 2d at 403.

The federal rule is unequivocably the same. In *Boggs* v. *Raines*, 273 F. 2d 636 (10th Cir. 1959), it was held that:

> "It is fundamental that one who commits acts constituting two offenses has no inherent right to be charged with the lesser of two offenses."

In *Erlich* v. *United States*, 238 F. 2d 481, 485 (5th Cir. 1957) the Court said:

> "A defendant cannot complain merely because this charge against him is brought under the statute carrying the more serious penalties when two statutes punish the same general acts."

Similar holdings are found in *Rosenberg* v. *United States*, 346 U. S. 273, 294-95 (1953); *United States* v. *Baumgarten*, 300 F. 2d 807, 808 (2nd Cir. 1962); *Siravo* v. *United States*, 377 F. 2d 469, 473 (1st Cir. 1967); *United States* v. *Eisenmann*, 396 F. 2d 565, 567-68 (2nd Cir. 1968); *Black* v. *United States*, 405 F. 2d 187 (5th Cir. 1968); *United States* v. *Escobar*, 410 F. 2d 749 (5th Cir. 1969).

CONCLUSION.

For the foregoing reasons, the Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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